IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ADVANCE CELLULAR SYSTEMS, INC. Plaintiff v. PUERTO RICO TELEPHONE COMPANY, Inc. Defendant	Civil No. 97-2511 (JAF)

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO SHOW CAUSE AND CROSS-MOTION TO DISMISS FOR LACK OF PROSECUTION

TO THE HONORABLE COURT:

COMES NOW, the defendant Puerto Rico Telephone Company (D/B/A Verizon Wireless), through its undersigned counsel, and responds as follows:

In response to the Show Cause Order (Docket Doc. No. 73), plaintiff filed a motion on August 2, 2007 (Docket Doc. No. 75) that reveals years of strategic gamesmanship to deliberately abandon its claims before this court- that had denied plaintiff's motion for preliminary injunctive relief- hoping to find a more favorable forum for its claims in the Bankruptcy Court:

1) This court would be within its discretion to dismiss this action for lack of diligent prosecution measured in years.

As an excuse for not prosecuting the case for eight years, plaintiff alleges that PRTC filed a motion to dismiss for failure to state a claim (that was not resolved) and moved to stay discovery so ACS alleges there was nothing for it to do in this case. Not so. Plaintiff concedes that Judge Gierbolini never ordered a stay of discovery. As a matter of law, a motion to dismiss does not foreclose an opposing party from serving discovery requests or moving to compel pending resolution of the dispositive motion. Plaintiff did nothing. If plaintiff elected to do nothing it was its choice, not that it was court-ordered. The procedural posture of this case did not excuse plaintiff from failing to prosecute its claims for eight years.

2) Plaintiff seeks cover behind the Judgment closing this action in 1998 as a reason for its prolonged inactivity arguing that the case was in state of judicial coma, but fails to contest that for years it did not move to reopen the Judgment until the motion for leave to amend eight years later in December 2006 (Docket Doc. No. 43). The 1998 Judgment by itself was proof positive that the

case had been closed. No more prior notice by this court is required before dismissing the case after a prolonged period of inaction measured in years. Further, in that motion at 5, plaintiff acknowledges the finality of the 1998 Judgment for ACS expressly requests to "reopen the case". Thus, plaintiff clearly knew that the case was inactive and it had to act and move the court to reopen it. Why ACS waited eight years is inexcusable or can only be explained by plaintiff's conscious litigation strategy to find another forum for its claims. There is no basis for a reasonable belief that this case was active after 1998 or that plaintiff could reasonably rely on the Judgment to excuse its inactivity.

On November 10, 1998, the District Court closed this action and entered an Order and Judgment "as it has been removed to the Bankruptcy Court." (Doc. No. 38). On March 29, 2000, Judge Pieras affirmed the Bankruptcy Court's decision to remand the "non-core" claims of ACS to the District Court (Gierbolini, J.) in the present action. When Judge Pieras, in 2000, affirmed the order to remand the case to this court, plaintiff, who had lost its appeal, did not prosecute the case or request Judge Gierbolini to reopen it on grounds that the circumstances of the Judgment had changed. In 2000, plaintiff knew that the predicate for

the closing order in the Judgment had changed because Judge Pieras determined that the case was properly before the District Court. Plaintiff failed to both inform Judge Gierbolini that the case was no longer in the Bankruptcy Court and ask relief to reactivate the case. At least six years of inactivity elapsed and are again unexplained. Significantly, now that the Court of Appeals in In re Advanced Cellular Systems Inc., 483 F.3d 7 (1st Cir. 2007), *reh'g denied*, has rejected plaintiff's main defenses to PRTC's proof of claim in bankruptcy, ACS faces PRTC's unopposed summary judgment motion for collection of monies in the District Court before Judge Casellas. Since the appellate decision dooms plaintiff's chance of success in bankruptcy, ACS has changed course by seeking to jump start the abandoned (and meritless) claims in this court.

3) What is remarkable is plaintiff's candid admission that it attempted to litigate these same claims in the Bankruptcy Court during the proceedings of PRTC's proof of claim. The significance of plaintiff's admission is that, on June 4, 2001, the Bankruptcy Court refused to permit plaintiff to prosecute its claims in those proceedings. After that ruling, plaintiff did nothing to file a separate adversary proceeding or seek relief to continue identical claims filed in this court. Thus, plaintiff knew at least

since 2000 or 2001, that it had to litigate its claims in this action and did nothing to reopen or move the case for years.

Plaintiff's gamesmanship to seek relief on its claims in the Bankruptcy Court and leave the same claims in this court suspended indefinitely was a strategic decision. It was a decision made at the outset of this case when this court denied plaintiff's motion for a preliminary injunction. Plaintiff's tactic of not prosecuting this case- that was closed and had a pending motion to dismiss- has undertones of judge-shopping because Judge Gierbolini had denied plaintiff's motion for a preliminary injunction and expressed the court's interim views about plaintiff's unlikelihood of success on the merits of its claims. Cf. Vaqueria Tres Monjitas v. Rivera Cubano, 230 F.R.D. 278 (D.P.R. 2005)(imposing sanctions for judge-shopping on attorney who moved to voluntarily dismiss and re-file the action after the court denied plaintiff's request for a preliminary injunction).

Plaintiff did not litigate the claims in this court, for eight years, for the simple reason that Judge Gierbolini had been unreceptive to its claims. Had the court not entered Judgment, it would have ruled on the motion to dismiss. This court should not condone

plaintiff's gamesmanship to seek to reopen this case after years of inactivity and dismiss it for lack of prosecution.

4) Finally, plaintiff's argument that its delay causes no "damages" to PRTC is unavailing and incorrect. Although the case in bankruptcy remains under Chapter 11, it is uncertain if ACS has assets from which PRTC could recover its proof of claim or the counterclaim. The bankruptcy proceedings have been stalled by the lengthy appeals process on the proof of claim. Years have passed giving ACS the opportunity to squander any assets that might have existed to satisfy a judgment in PRTC's favor. Accordingly, PRTC has been prejudiced by plaintiff's lack of prosecution.

WHEREFORE, based on the authorities cited in the show cause order, this court should find that plaintiff ACS's purported reasons to explain its inactivity measured in years are inexcusable or invalid and the action should be dismissed with prejudice for lack of prosecution; or in the alternative, deny leave to amend as futile or for lack of jurisdiction.

In San Juan, Puerto Rico, this 11th of August 2007.

CERTIFICATION: Today we electronically filed the foregoing with the Clerk of the Court using the CM/ECF

system which will send notification of such filing to plaintiff's counsel Zuleika LLovet and Jairo Mellado, Esq.

Respectfully Submitted,

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